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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 209

EMICH MOTORS CORPORATION AND U. S. ACCEPTANCE CORPORATION,

Petitioners,

vs.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents.

RESPONDENTS' REPLY TO MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR REHEARING OR MODIFICATION.

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The supplement to the petition for rehearing or modification proceeds on the theory that the gravamen of the defense in the instant case was that instead of being canceled for failure to use the financing facilities of GMAC, the dealerships of plaintiff were canceled because they refused "to abide by the installment resale prices fixed by respondents". (Supp. to Petn., p. 4).

Had this been true, there might be merit in the analogy of the *Seagram* case.* But it was not true and, indeed, was not even suggested by the pleadings,† during the entire course of the trial ‡ nor on the submission of the case to the Court of Appeals. It is entirely an afterthought, now sought to be supported by means of a distortion of the evidence, the issue before the Court of Appeals, and its ruling thereon.

In the trial court defendants did not confine their proof to a showing that the cancellation of plaintiff's dealerships did not result from the failure of those dealerships to finance through GMAC (the charge of the complaint, R. 9-10) but also sought to show the actual reasons for the cancellation. These were in substance that Fred Emich was an all-around poor dealer (R. 6124-6125, 6759-6760, 8899, 8905), that the dealerships were undercapitalized, that they were unable to obtain their fair share of the business in their own community, and that they created serious customer dissatisfaction in both service and installment financing which injured the good will of plaintiffs and of Chevrolet (R. 8899, 8905).

As to this last item defendants offered evidence that plaintiffs had an established practice of cheating customers by pretending to charge one rate for financing the retail purchase of a car and then surreptitiously adding varying and arbitrary sums to the rate without the customer's knowledge (R. 5032-5033). This practice is known to the trade as packing (R. 2931, 2934, 2937, 3129, 6871). The offered evidence also showed Emich's instructions to em-

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* *Kiefer-Stewart Company* v. *Joseph E. Seagram & Sons, Inc.*, October Term, 1950, No. 297, reported at 182 F. 2d 228.

† No such defense was advanced by the answer of defendants (R. 27-46) or their proposed amendment to answer (R. 107-112).

‡ Neither plaintiffs nor defendants introduced or offered any evidence that defendants tried to have plaintiffs use the rates of GMAC or any other financing company.

ployees were that there was a sucker born every minute and that when one came through the door they had to be ready to get him (R. 5033), that a pack was added to the finance charge on every installment sale of a new Chevrolet, the amount of the pack not being consistent but being whatever could be added without the customer's knowledge (R. 5033, 8691-8694, 8981-8989), and that when a customer discovered the fraud he was to be given some false explanation (R. 5064).

The great majority of this evidence was excluded by the trial court, and Fred Emich denied all of it. He said he never packed or cheated a customer (R. 1345, 1357, 1365, 7385-7386) and that in fact his charges were the same as those of other standard nonrecourse finance companies (R. 1345). This made it necessary to show his actual charges, not for the purpose of demonstrating that his charges were in excess of those charged by GMAC, but to show the varying packs which had been imposed upon unwitting customers. Defendants also offered the testimony of customers who had discovered the fraud and complained to plaintiffs and to defendants (R. 2474, 4805-4807, 4834, 4937-4941).

It was the exclusion of evidence relating to this type of fraudulent overcharge which the Court of Appeals correctly held "wrongly prevented a fair presentation of a legitimate defense" (R. 9464-9465). Plaintiffs' representation in their supplemental petition that the term "overcharge" meant merely a charge above some "maximum price used as a standard" (Supp. to Petn., p. 4), is simply not true. The "overcharge" was the varying and arbitrary sum added by plaintiffs without the customer's knowledge to the charges shown by the finance charts of whatever company plaintiffs were using. Plaintiffs' own records always referred to this pack as "overage" (R. 5033); customers of plaintiffs and employees of defendants some-

times called it "overcharge" (R. 8851, 8852, 8888, 8926) and sometimes "pack" (R. 3502, 5600, 6201-6204) or "pad" (R. 8873, 8879, 8894).

That the Court of Appeals understood that the dispute was over the deceitful and fraudulent use of the pack to cheat customers rather than an attempt by defendants to standardize prices or fix a maximum price is evidenced not only from what is included in that court's opinion but also from the fact that it does not contain one word about fixing prices, maximum or otherwise. There simply was not such an issue in the case, nor can one be made from the evidence even as an afterthought. Indeed, there was no evidence that defendants ever sought to get plaintiffs to charge the GMAC finance rates or any other rates. What they did attempt was to stop plaintiffs' cheating of customers by means of the undisclosed pack or overcharge.

It is respectfully submitted that the motion for leave to file the supplement to petition for rehearing or modification should be denied or, if allowed, that the petition itself should be denied.

Respectfully submitted,

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